LEONG SENG KIAT

v.

LAW PENG GUAN & ORS.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 582 OF 1987]
6 APRIL 1987

CIVIL PROCEDURE: *Application by intervener - To set aside judgment in default obtained by the plaintiff against the defendant - Whether order for substituted service by the plaintiff was issued properly - Whether judgment in default of appearance under O. 13 r. 12 Rules of the Supreme Court 1957 can be obtained in cases for specific performance - Whether delay will prejudice application to set aside judgment in default.*

This is an application by the applicant intervener to set aside the judgment in default of appearance obtained by the plaintiff against the defendants on 20 July 1979.

On 17 September 1971, the applicant and his daughter had jointly purchased from one Yew Ah Pee a piece of property at the price of RM58,000. The said property was purchased by Yew Ah Pee from the defendants on 2 January 1974. Since the property was at that time charged to Malaysia Building Society Berhad, the issue of the document of title could not be released to the applicant. The said Yew Ah Pee assigned the said property to the applicant by way of a deed of assignment dated 20 November 1978.

The applicant had paid Yew Ah Pee a total sum of RM44,442 towards the purchase price and tendered the balance of the redemption sum to Malaysia Building Society Bhd through a firm of solicitors but the Malaysia Building Society refused to accept this sum.

When Yew Ah Pee refused to effect a valid and registrable transfer of the said property to the applicant, they commenced action for specific performance of the sale agreement dated 17 September 1977.

When the solicitor for the plaintiffs caused a search to be made at the Land Office, Pulau Pinang in respect of the said property it was discovered that the said property was registered in the name of the plaintiff as a result of default judgment entered against the defendant on 20 July 1979.

In the applicant's affidavit it was stated that the plaintiffs had made several attempts to serve the writ on the defendants but had been unsuccessful. An application for substituted service by posting a copy of the order and the writ itself on the front door of the last known address of the defendants and on the notice board of the Court was granted by the Court on 21 March 1979. On 20 July 1979, the Registrar signed a certificate of non-appearance and on the same date the plaintiff obtained Judgment in default of appearance against both defendants.

The application to set aside the judgment in default by the applicant intervener is on the basis that he is the beneficial owners and claiming title to the said property by virtue of the sale and purchase agreement between him and Yew Ah Pee. The applicant alleged that the order for substituted service was irregular in that the substituted service should have been issued for service by advertisement in the newspaper since the defendants were no longer residing at their last known address. The second ground of the applicant's application is regarding the right of the parties to obtain judgment in default for specific performance cases.

The plaintiff also contended that there was a delay by the applicant intervener in making the application to set aside judgment in default obtained by the plaintiff. He contended that it was for the applicant to show good faith in making this application and that it was not made within a reasonable time.

Held:

[1] The order should have included service by advertisement because the defendants were no longer residing at the last known address and there are reason to believe that they were keeping out of the way to evade service. The object of substituted service is to give notice to the defendants of the writ having been filed against them so that they might be aware of and able to resist the claim. Where their residence/address is no longer known the best form of substituted service should be by advertisement in the newspaper. The order for substituted service dated 21 March 1979 was irregular and defective which made the order a nullity and therefore must be set aside.

[2] The judgment in default of appearance dated 20 July 1979 is set aside. Under O. 13 r. 12 of the Rules of the Supreme Court 1957 it is clear that where the writ is specially indorsed, as in this case, the party served, if he does not appear within the time limited for appearance, the plaintiff will proceed with the action as if such party had appeared. As such in this case, the plaintiff is precluded from entering judgment in default against the defendants.

[Applicant's application allowed.]

Cases referred to:

Craig v. Kanseen [1943] 1 All ER 108

Lam Kong Co. Ltd. v. Thong Guan Co. (Pte.) Ltd. [1985] CLJ (Rep) 181

Legislation referred to:

Rules of the High Court 1980, O. 13 r. 8

Rules of the Supreme Court 1957, O. 13 r. 12, O. 14A, O. 70 r. 2

For the applicant/intervener - Louis Van Buerle; M/s. Cheong Wai Meng & Van Buerle

For the plaintiff/respondent - Darshan Singh Khaira; M/s. Darshan Singh & Co.

JUDGMENT

Mohamed Dzaiddin J:

(On Enclosure 14)

This is an application by the applicant intervener to set aside the judgment in default of appearance in this suit obtained by the plaintiff against the defendants on 20 July 1979.

The circumstances leading up to this application are clearly set out in the applicant's affidavit affirmed on 24 October 1986 (encl. 13). Briefly, on 17 September 1977 the applicant and his daughter jointly purchased from one Yew Ah Pee a piece of land known as holding No. 3379, Bandar Tanjung Bunga, District of Timor Laut, Pulau Pinang with a residential house erected thereon bearing postal address No. 72, Jalan Sam Ah Chow, Tanjung Bungah, Penang ("the said property") at the price of RM58,000. The parties executed the sale and purchase agreement on even date. The said property was purchased by Yew Ah Pee from the defendants on 2 January 1974. However, as the property was then charged to Malaysia Building Society Bhd., the issue of document of title could not be released to the applicant. The said Yew Ah Pee assigned the said property to the applicant by way of deed of assignment dated 20 November 1978. The applicant had paid Yew Ah Pee a total sum of RM44,442 towards the purchase price and had tendered the balance of the redemption sum due to Malaysia Building Society Bhd. through Messrs K. Vijaya, advocate and solicitor.

But Malaysia Building Society Bhd. refused to accept the redemption sum. In the meantime, the applicant and his family went into occupation of the said property and they have been residing therein since nine years past.

After refusal by Yew Ah Pee to effect a valid and registrable transfer of the said property to the applicant and his daughter jointly, they then commenced legal action against him for specific performance of the sale agreement dated 17 September 1977 *vide* Penang High Court civil suit no. 287 of 1980 . This suit is still pending final disposal by the Court. Subsequent to the filing of the civil suit No. 287 of 1980, Yew Ah Pee as defendant, brought in the defendants in the present suit as third parties whereby he claimed against them to be indemnified against the applicant's claim and for specific performance of the purchase agreement dated 2 January 1974 providing for the sale of the said property by the defendants to him.

In the meantime, the applicant instructed his present solicitors to cause a search to be made at the Land Office, Pulau Pinang in respect of the said property. The result was quite starling because the solicitors had discovered that the said property was registered in the name of the plaintiff on 4 August 1982 as a result of default judgment entered against the defendants on 20 July 1979. Again, the circumstances leading up to the granting by this Court of the judgment-in-default against the defendants are clearly stated in the applicant's affidavit. The plaintiff filed the specially indorsed writ on 18 December 1978 and was issued by the Registry on 20 December 1978. Several attempts were made to serve the writ on the defendants at their last known address, No. 7, Road 2, Mount Eskine Road, but were unsuccessful. On 3 March 1979, the plaintiff applied to Court for an order for substituted service by posting a copy of the order and the writ itself on the front door of the last known address of the defendants and on the notice board of the Court. The order was granted on 21 March 1979 and on 24 April 1979 the court process server served the said order and the writ as per content of the order. He then affirmed his affidavit of service. On 20 July 1979, the Registrar signed a certificate of non-appearance and on the same date the plaintiff obtained a judgment-in-default of appearance against both defendants.

Hence, by this application the applicant is seeking for an order to set aside the said judgment-in-default. In a way, this application is quite peculiar because it is not the defendants who are seeking to set aside the judgment but the applicant, who appeared here by leave of this Court as the intervener, on the basis that he is the beneficial owner and claiming title to the said property by virtue of the purchase agreement between him and Yew Ah Pee.

The applicant relied on two grounds in seeking the order of this Court to set aside the judgment-in-default of appearance dated 20 July 1979, namely, that the order for substituted service was irregular and the judgment-in-default of appearance was wrong in law and contrary to the Rules of the Supreme Court 1957 (the Rules applicable in this application).

On the first point, Mr. Louis Van Buerle submitted that the order for substituted service should have been issued with a prayer for service by advertisement in the newspapers since the defendants were no longer residing at their last known address. The order states that both the writ and the order be posted on the front door of the defendant's last known address and the court's notice board. According to Ismail bin Nor, the Court process server, he visited the defendant's last known address on four occasions, but he was informed by the occupants that the defendants were no longer staying there and that they were not known to the occupants at all. Mr. Darshan Singh also deposed in his affidavit that there was reason to believe that the defendants were keeping out of the way to evade service. I agree with

Counsel's submission that the order should have included service by advertisement because the defendants were no longer residing at the last known address and there was reason to believe that they were keeping out of the way to evade service. The object of substituted service is to give notice to the defendants of the writ having been filed against them, so that they might be aware of and able to resist the claim. I think where their residence or address is no longer known, the best form of substituted service should be by advertisement in the newspapers. The same can be said for substituted service by posting the Order and the writ on the Court's notice board. What good is there for such posting when there was reason to believe the defendants were evading service. In the circumstances of this case, it is my finding that the order for substituted service dated 21 March 1979 was irregular and defective which made the order a nullity and therefore, must be set aside. (*Craig v. Kanseen* [1943] 1 All ER 108.)

The second ground concerns the right of the parties to obtain judgment-in-default for specific performance cases. It is not disputed that the plaintiff's claim against the defendants is for specific performance of a sale and purchase agreement dated 15 September 1978. It is also not disputed that the practice rules applicable in this case is O. 13 r. 12 of the Rules of the Supreme Court 1957, which has now been repealed and substituted by the present Rules of the High Court 1980. Under O. 13 r. 12 of the 1957 Rules it is clear that where the writ is specially indorsed, as in this case, the party served, if he does not appear within the time limited for appearance, the plaintiff will proceed with the action as if such party had appeared. As such, in this case, the plaintiff is precluded from entering default judgment against the defendants. There is a direct authority on this matter in *Lam Kong Co. Ltd. v. Thong Guan Co. (Pte.) Ltd.* [1985] CLJ (Rep) 181 Abdul Hamid CJ (Malaya), in delivering the judgment of the Court, also dealt with the question of summary Judgment in actions for specific performance, where he referred to O. 14A of the 1957 Rules. Order 14A says that in any action commenced by writ of summons indorsed with a claim for specific performance of a claim, the plaintiff may, whether the defendant has appeared or not, on affidavit made by himself or by any other person verifying the cause of action and stating that in his belief there is no defence to the action, apply to the Court for judgment and the Court or Judge may thereupon give judgment unless the defendant satisfies the Court of judge that he has a good defence on the merits or discloses facts sufficient to entitle him to defend. Therefore, it is clear that the plaintiff cannot obtain judgment-in-default of appearance in an action for specific performance.

Mr. Darshan Singh, Counsel for the plaintiff resisted this application and his main complaint was that the judgment-in-default was obtained eight years ago and the applicant made no attempt to set it aside until this application was brought. He contended that it was for the applicant to show good faith in making this application and that it was not made within a reasonable time. He also submitted that the applicant merely had commercial interest in the said property and he ought to sue the defendants for damages and not bring this application against the plaintiffs. On the Counsel's submission, I need only address myself on the question of delay. There was no question of *mala fide*. In my judgment, the applicant has explained in his affidavit (encl. 13) about the delay in making this application. The applicant became aware of the default judgment in this suit after he engaged the present solicitors to take over the conduct of the proceedings in civil suit no. 287 of 1980. The solicitors made searches at the High Court registry after taking over the matter from the former solicitors, who virtually sat on the matter for some years before even filing summons-for-direction in civil suit no. 287 of 1980. The present solicitors also discovered about the foreclosure action

in originating Summons no. 100 of 1978 in respect of the said property. It is quite unfortunate that the applicant was not informed by his former solicitors on the matter. The applicant is 70 years old and an illiterate. It is quite natural that he relied on his solicitors to do the needful. Order 13 r. 8 of Rules of the High Court 1980 gives a completely unfettered discretion to the Court to set aside the judgment entered in default of appearance. There does not seem to be any prescribed time within which the application should be made. However, O. 70 r. 2 of the 1957 Rules provides that any application to set aside for irregularity any proceedings must be made within a reasonable time.

Therefore, considering the circumstances in this matter, I am satisfied that there was no inexplicable delay on the part of the applicant to make this application because since he became aware of the present civil suit, his solicitors took steps by first applying for him to be made an intervener and thereafter making this present application.

For the above reasons, I allow the applicant's application as prayed. The judgment in default of appearance dated 20 July 1979 is hereby set aside and I make an order that the applicant be cited as one of the defendants in this action. Costs of this application shall be costs in the cause.

Also found at [1988] 2 CLJ 666